DEC 28 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 658

SHREVEPORT TELEVISION COMPANY, *Petitioner*

vs.

FEDERAL COMMUNICATIONS COMMISSION

and

SOUTHLAND TELEVISION COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Shreveport Television Company, petitioner,[1] prays that a writ of certiorari issue to review the order of

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[1] Shreveport Television Company is a Louisiana partnership originally comprising Don George, Henry E. Linam, Ben Beckham Jr., and Carter Henderson. Since the Commission decision herein, Don George has died. His 43% interest is held by his executrix; and under the terms of the partnership agreement, its affairs are to be carried on by the surviving partners.

the United States Court of Appeals for the District of Columbia Circuit entered herein on October 2, 1956.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is unreported and is printed in full as Appendix A hereto, *infra*, p. 1a.

JURISDICTION

The judgment of the Court of Appeals, in the form of an order vacating a decision of the Federal Communications Commission and remanding the case to the Commission, was entered on October 2, 1956; and the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and 47 U.S.C. § 402(j).

QUESTION PRESENTED

Whether the Court of Appeals upon appeal from a final decision of the Federal Communications Commission pursuant to 47 U.S.C. § 402(b), may vacate the Commission decision and remand for further consideration by reason of an event which occurred after the Commission decision had become final and while the appeal therefrom was pending.

STATUTES INVOLVED

The statutory provisions are Sections 402(b) - (j) and Section 405 of the Communications Act of 1934, Act of June 7, 1934, c. 652, §§ 402(b) - (j) and 405, 48 Stat. 1093, 1095, as amended, 47 U.S.C. §§ 402(b)-(j) and 405; and Act of June 11, 1946, c. 324, § 10, 60 Stat. 243, 5 U.S.C. 1009(e). All are set forth in full in Appendix B hereto, *infra* pp. 1a-7a.

STATEMENT

Petitioner and respondent Southland Television Company applied for permits for the same television facility at Shreveport, Louisiana. These applications being mutually exclusive, the respondent Commission designated them for comparative hearing on May 20, 1953, together with that of a third applicant which has since abandoned the case.

The case was fully heard by an examiner who issued a decision in favor of petitioner on June 7, 1954. On May 20, 1955, the Commission, after the filing of extensive exceptions and briefs and after hearing oral argument, issued its final decision, also in favor of petitioner.

The competing applicant which has since dropped out filed a timely appeal with the Court of Appeals and respondent Southland Television Company petitioned the Commission for Rehearing and Reconsideration. The latter petition was denied by the Commission on November 17, 1955, and respondent appealed to the Court of Appeals on December 15, 1955, invoking its jurisdiction under 47 U.S.C. 402(b). In the meantime petitioner, at great expense, has constructed and put into operation the first television station to bring service to the Shreveport area.

On June 5, 1956, after briefs had been filed and the case was awaiting argument in the Court of Appeals, Don George, one of the partners comprising the petitioner, died. Petitioner filed the requisite suggestion of death with the Court of Appeals; and on June 11, 1956, respondent Southland Television Company moved the Court to remand the case to the Federal Communications Commission for further consideration based on the fact of Don George's death.

Both Petitioner and the Commission opposed the motion to remand on the ground that the sole issue before the Court was the correctness of the Commission's decision on the record before it when that decision was rendered. The Court of Appeals nevertheless entered its *per curiam* order of October 2, 1956, vacating the decision of the Commission and remanding the case to the Commission "with directions to reconsider its decision in the light of the circumstance that, by reason of the death of Mr. Don George, the fact to which the Commission attached greatest weight[2] no longer exists".

REASONS FOR GRANTING THE WRIT

1. The ruling of the Court below raises questions of central importance in the field of judicial review of administrative decisions, and, more specifically, in respect of "the distribution of judicial authority under the Communications Act of 1934 . . .". *Federal Communications Commission* v. *Columbia Broadcasting System,* 311 U.S. 132, 133, 61 S. Ct. 152 (1940). The Court below has ruled that the pendency of proceedings for judicial review of a final order of the Communications Commission postpones the point at which the comparative proceeding before the administrative agency terminates. It thus confuses the spheres allocated by Congress to the judicial and administrative processes respectively. This action by

[2] It is only one of the vices of the lower court's method of handling this case that permits this sort of a conclusion in advance of having examined the Commission's decision and deciding its correctness upon the record before it. In fact, many other factors which were not affected by Mr. George's death were given significance; and it cannot be said on superficial examination that Mr. George's participation was of overriding importance.

the United States Court of Appeals for the District of Columbia Circuit is in conflict with the basic scheme of the Communications Act and with the applicable decisions of this Court.

2. The ruling of the Court below is plainly contrary to specific provisions of the statute governing its jurisdiction and procedure on appeal from the Federal Communications Commission. This is, again, a matter of importance because the Court below is the only court given jurisdiction of appeals from the instant type of proceeding before the Commission; there can, consequently, arise no conflict among the circuits, and the Circuit Court of Appeals for the District of Columbia has more than once made plain its adherence to the erroneous course it now pursues.

I. THE ISSUE AS TO THE DISTRIBUTION OF ADMINISTRATIVE AND JUDICIAL POWER

The action of the Court below represents a bald usurpation by the Court of the Commission's discretion in respect of reopening. Indeed, since the record had been closed and the period for requesting rehearing had expired, it is probable, as is argued below, that it usurped a discretion the Commission itself no longer had. No appeal, by request for rehearing, had ever been made to the Commission's discretion on the matter of Don George's death.[3] The Court did not

[3] Respondent Southland Television Company's petition for rehearing was on entirely different grounds, had been denied before Don George's death and had no effect whatever in the decision of the lower Court. This action by the Court is inconsistent with its own ruling in *Black River Valley Broadcasting Co.* v. *McNinch*, 69 App. D.C. 311, 101 F. 2d 235, cert. den. 307 U.S. 623, 59 S. Ct. 793 (1939), which requires exhaustion of the administrative remedy of rehearing, once invoked, prior to appeal.

remand for the purpose of directing the Commission to exercise the discretion it had never previously had the opportunity to exercise. It "vacated" the Commission's decision because of an event which had not yet occurred when that decision became final.

The summary character of the order of remand issued by the Court below gives no clue to the rationale on which it acted. It has elsewhere been quite specific, however. In *W. S. Butterfield, Inc.* v. *Federal Communications Commission,* U.S. App. D.C. , F. 2d (Nos. 12527, 12666, 12752 decided May 24, 1956), the Court of Appeals for the District of Columbia Circuit was faced with a case similar to the instant one, except that a reopening and rehearing had been requested of the Commission on the basis of changed circumstances (which arose after its decision, but before a previous rehearing petition had been acted upon) and had been denied.

The Court said (slip opinion page 3):

> "We held in *Enterprise Co.* v. *Federal Communications Commission* (U.S. App. D.C. , 231 F.2d 708, 712-13) that the Commission had erred in not reopening the record to receive evidence as to events transpiring before its determination of the petition for rehearing . . . . Our decision in *Enterprise* was not limited to events occurring before decision of petitions for rehearing . . . . We said that we were laying aside the question of whether there was a *right* to reopening of the record to include events occurring after filing of petitions for rehearing. We confined ourselves to holding that the Commission had power to reopen and that, in the circumstances of that case, it was an abuse of discretion not to exercise that power".

Thus the Court made it clear that it recognized a discretion in the Commission over reopening, and found it abused. It then went on to elaborate on the time within which such a discretion could (and should, as it thought) be exercised:

> "We pointed out that the Commission's power to reopen the record was coextensive with its jurisdiction over the order it has made and that such jurisdiction existed until the time to appeal had expired".

Following this sentence the Court inserted a footnote reading as follows:

> "Albertson v. Federal Communications Commission. 87 U.S. App. D.C. 39, 41-42, 182 F.2d 397, 399-400 (1950). As to events occurring during pendency of appeal, see Fleming v. Federal Communications Commission, 96 U.S. App. D.C. 223, 226, 225 F.2d 523, 526 (1955)".

It was thus made explicit that, as was held in *Fleming* and again in the instant case, both the Commission's discretion and the Court's power to compel its exercise extend to all events occurring while an appeal from a Commission is pending.[4]

This holding contains a tacit but none the less apparent misconception of the Court's function in such appellate proceedings. The Commission is, of course, required to reach its decision in comparative

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[4] In *Enterprise Co.* v. *Federal Communications Commission*, 231 F. 2d *supra* at p. 712, the Court stated: "As we held in Albertson v. Federal Communications Commission, 87 U.S. App. D.C. 39, 41-42, 182 F. 2d 397, 399-401, jurisdiction over an order remains with the Commission until the time for appeal has expired. . . . See, also, Fleming v. Federal Communications Commission, 96 U.S. App. D.C. 223, 225 F. 2d 523".

cases, such as the present one, upon the record before it. Once it has done so, the Court is empowered only to pass upon whether it has acted correctly. The pendency of an appeal alleging error could hold the comparative proceeding open only if the Court were acting as a higher administrative tribunal with authority to reach its own decision on the merits. From the holdings in *Butterfield, Fleming* and the instant case, it is evident that the Court of Appeals does not believe the comparative phase of the administrative hearing is finally concluded by the Commission's decision and expiration of the period allowed for rehearing. Finality must in its view await upon decision of the appeal.

It is clear that this view is in error. Indeed, this is especially clear in respect of the Court of Appeals for the District and its relations with the Communications Commission, because at one time that Court was given such administrative authority over the predecessor of the present Commission and later was expressly deprived of it. Section 16 of the Radio Act of 1927 directed the Court of Appeals for the District, upon appeal, to "hear review and determine the appeal" upon the record made before the Commission and upon such additional evidence as the Court might receive, and the Court was empowered to "alter or revise the decision appealed from and enter such judgment as to it may seem just". (44 Stat. 1169, 47 U.S.C. § 96). The Supreme Court held in *Federal Radio Commission* v. *General Electric Co.,* 281 U.S. 464, 50 S. Ct. 389 (1930), that this provision made the Court of Appeals "a superior and revising agency" in the administrative field, and, in consequence, that

its decision on an appeal from the Commission was not a judicial judgment reviewable by the Supreme Court.

Following this decision, Congress, by the Act of July 1, 1930, c. 788, amended § 16 of the Radio Act of 1927 expressly to limit the review by the Court of Appeals to "questions of law", and provided "that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious". (47 U.S.C. § 96).

In *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 53 S. Ct. 627 (1933), the Supreme Court had occasion to determine the effect of this alteration of the review powers of the Court of Appeals. It said (289 U.S. at p. 276):

> "This limitation is in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review".

There seems no doubt that the purpose of the present § 402 of Title 47 U.S.C., which superseded § 16 of the Radio Act of 1927 as amended, carried forward this limitation on the scope of the Court of Appeals' powers of review. *See e.g. Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 60 S. Ct. 437 (1940).

The Court of Appeals first intimated that the provision for judicial review under powers so limited holds open the administrative decision in *Albertson* v. *Federal Communications Commission*, 87 U.S. App.

D.C. 39, 182 F.2d 397 (1950). The Court there held that jurisdiction over a contested order remains with the Commission during the period for taking an appeal. It cited as authority *Babler* v. *United States,* 137 F.2d 98 (CCA 8, 1943), and *United States ex rel. Harrington* v. *Schlotfeldt,* 136 F.2d 935 (CCA 7, 1943).

Both of the cited cases concerned the question of the jurisdiction of a lower federal court over matters occurring during the period for appeal to a higher court. Their citation as governing the question of the Commission's power over its orders completely overlooks what Mr. Justice Frankfurter has cogently pointed out in the *Pottsville* case *supra* with respect to a mandate from the Court of Appeals to the Commission. There, at p. 141 of the official reporter, he said:

> "This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of the federal courts inter se—a relationship defined largely by the courts themselves—but the due observance by the courts of the distribution made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution".

This vital distinction results in a situation where the procedural rules of the reviewing court are totally unrelated to the functions of the agency reviewed. As Mr. Justice Frankfurter further said (ibid.):

> "A review by a federal court of the action of a lower court is only one phase of a unified process. But to the extent that a federal court is authorized to review an administrative act there is superimposed upon the enforcement of legislative

> policy through administrative control a different process from that out of which the administrative action under review ensued".

It would seem abundantly clear from this that there is not, as *Albertson* holds, any relation between the period provided for seeking review in the judicial process and the finality of the action taken in the administrative process. Therefore, when *Butterfield, supra,* and, by inference, *Fleming, supra,* and the instant case followed *Albertson* and extended it to cover the period during which appeal was pending, they were plainly wrong.

The consequences of this error are not minor. The cases already cited show that this Court has regarded the conceptual error here illustrated as warranting correction in proceedings by way of certiorari. In addition, however, the particular ruling below which is sought to be reviewed here has wide-ranging practical consequences which rise to a level of importance warranting their correction also.

The nature of these consequences could find no better elucidation than the words of this Court in *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 514-15, 64 S. Ct. 1129, 1134-5 (1944):

> "Administrative consideration of evidence — particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might

> demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise, it has been considered that the discretion to be invoked was that the body making the order, and not that of a reviewing body".

The Court then goes on to point out that only once in the history of administrative law has it reversed a Commission as having abused its discretion by refusal to grant a rehearing because of facts arising after decision. *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U.S. 248, 52 S. Ct. 146 (1932); and in its subsequent discussion (id. at pp. 515-17) it makes clear the insecure status of that case as authority. Cf. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 534-5, 66 S. Ct. 687, 697 (1946).

The *Atchison* case is, moreover, clearly distinguishable from the one here presented. There the Interstate Commerce Commission had closed its record in 1928 and proposed to make effective in 1931 rates based on the old record despite an intervening petition for rehearing alleging changed circumstances. Here the Commission has taken final action based on the state of affairs extant at the time it acted, and it does not propose to take later action against anyone subject to its jurisdiction in the face of intervening change; nor has it had before it or rejected a timely petition for rehearing alleging such change.

If the teaching of *Interstate Commerce Commission* v. *Jersey City, supra,* is to be ignored, as was done below, the results will endanger the orderly functioning of the administrative process. Already a single Commission has twice in slightly over a year (in *Fleming, supra,* and the instant case) been ordered to reopen a case it considered closed—and that without any finding by the Court of Appeals that there was error of any sort in the decision under review. In each case the occasion for reopening was the death of a partner in one of competing applicants which occurred after the Commission's decision became final but while an appeal to the Court of Appeals was pending. If this can be done because of death, presumably a similar result will ensue when there is a change in any other significant factor upon which the Commission's decision was based.

In view of the length of the appellate process, it must be anticipated that many such changes will occur in the factors underlying the final administrative decisions of many agencies, with a consequent burden on the agencies of required reopenings and reconsiderations which may well prove insupportable. The burden on the agency directly affected here will be especially heavy because, under the holding in *Johnston Broadcasting Co.* v. *Federal Communications Commission,* 86 U.S. App. D.C. 40, 175 F.2d 351 (1949), an exceptionally wide range of factors is held to be significant in this Commission's determination of comparative cases.

II. THE SPECIFIC STATUTORY PROCEDURE FOR REVIEW

The Communications Act, as amended, provides specifically the time within which applications for re-

hearing are to be made. 47 U.S.C. § 405. Once the thirty days there afforded an applicant has expired, he is finally concluded and loses his standing to be treated as a competing applicant (subject only to the possibility that, upon appeal, the Commission may be held to have committed error in finding against him). *KFAB Broadcasting Co.* v. *Federal Communications Commission,* 96 U.S. App. D.C. 268, 225 F.2d 560; cert. den. 350 U.S. 923, 76 S. Ct. 212 (1955).

Parenthetically, it should be re-emphasized that the Court of Appeals has not found that the Commission was in error in the decision here under review. It has simply held, in effect, that respondent Southland Television Company must be treated as retaining its status as a competing applicant throughout the appeal process.

At the outset it should be pointed out that there is no possible argument that only by so holding can the interest of the public in the character of broadcasters be upheld. Final termination of the opportunity for competing applicants to seek reopening of a comparative hearing, which § 405 plainly contemplates, does not in any sense terminate the Commission's power to protect the public interest from any injury threatened by changes in the composition of the successful applicant, or in its operations, whenever they may occur. The Commission has ample powers to vindicate the public interest by revoking the permit it has issued if at any time conditions come to its attention which would have warranted a refusal to grant it originally. 47 U.S.C. § 312 (a) (2).

Similarly, any change amounting to a transfer of control, such as the involuntary transfer effected by

the death of Don George in the instant case, must have the approval of the Commission upon an affirmative finding that the transfer will serve the public interest. 47 U.S.C. § 310(b).[5] Further, the Commission has and exercises broad supervisory powers over all operations of its permittees and licensees at the periodic renewal dates when, as required by 47 U.S.C. § 307(d), the Commission determines that renewal will be in the public interest.

With the public interest thus protected, there is no occasion for the Court of Appeals to stretch, as it has done, the scope of review conferred upon it by 47 U.S.C. § 402. That Section, in Subsection (g), requires that the Court determine the appeal "upon the record before it". Subsection (d) of the same Section throws additional light upon what record is meant by this phrase. It is there required that:

> "The Commission shall file with the court a copy of the order complained of, a full statement in writing of the facts and grounds relied on by it in support of the order involved upon said appeal, and the originals or certified copies of all papers and evidence presented to and considered by it in entering said order".

It is apparent that all of the material so required is simply the record upon which the Commission reached its decision from which appeal is taken. There is complete absence of any suggestion that there is to be brought to the Court of Appeals in the first instance any material subsequently arising and which, by hypothesis, the Commission did not consider in

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[5] Such approval has been obtained by Petitioner pursuant to Commission procedure therefor.

reaching its decision. Moreover, the language of § 405 of the Act, dealing with rehearing, is eloquent in showing the Act's intention that there shall not be reviewed on appeal facts other than those in the Commission record. Thus, it is there provided:

> "The filing of a petition for rehearing shall not be a condition precedent to judicial review . . . except where the party seeking such review . . . relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass".

By this provision, a petition for rehearing becomes a prerequisite to review when new facts are relied on. Accordingly, it is apparent that the statutory scheme of judicial review contemplates solely review of the Commission's decision on the record before it and gives the Court of Appeals no authority to hold open during the pendency of an appeal the record the Commission has closed and which, under the statute governing the Commission, is no longer subject to reopening by the only method provided for that purpose—a petition to the Commission for rehearing.

As has been aptly said in another context:

> "No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do". *Scripps Howard Radio* v. *Federal Communications Commission,* 316 U.S. 4, 9, 62 S. Ct. 875, 879 (1942).

This fact of inevitable change cannot, however, justify the court in seeking to remedy such changes by the expedient of holding open the administrative proceeding on a comparative basis beyond the time appointed

by statute for its final closing. Finality must come somewhere, and it is for the Commission, not the Court, to deal with subsequent changes which affect the permit or license which it has issued and over which it has exclusive and continuing jurisdiction in the public interest. This the United States Court of Appeals for the District of Columbia has utterly failed to understand.

CONCLUSION

It is therefore respectfully submitted that a writ of certiorari should issue herein for the purpose of clarifying once again the necessity for "due observance by the courts of the distribution made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution". *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141, 60 S. Ct. 437, 440-1 (1946), and of clarifying the proper application of 47 U.S.C. §§ 402 (b), (d), (g) and 405.

Respectfully submitted,

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Attorneys for Petitioner

December 28, 1956

APPENDIX

APPENDIX

Appendix A

Before: EDGERTON, *Chief Judge,* PRETTYMAN and BAZELON, *Circuit Judges.*

Order

This case came on for consideration on appellant's motion to remand for further proceedings before the Federal Communications Commission, and was argued by counsel.

Upon consideration whereof it is ORDERED by the Court that the decision of the Federal Communications Commission entered herein on May 20, 1955, be, and it is hereby, vacated, and that this case be, and it is hereby, remanded to the Commission with directions to reconsider its decision in the light of the circumstance that, by reason of the death of Mr. Don George, the fact to which the Commission attached greatest weight no longer exists.

Per Curiam.

Dated: October 2, 1956

Appendix B

Title 47 U.S.C.:

§ 402. JUDICIAL REVIEW OF COMMISSION'S ORDERS AND DECISIONS—PROCEDURE

Right to Appeal

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

Filing Notice of Appeal; Contents; Jurisdiction; Temporary Orders

(c) Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon

filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

Notice to Interested Parties; Filing Copy of Order and Statement of Facts

(d) Upon the filing of any such notice of appeal the Commission shall, not later than five days after the date of service upon it, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same and shall thereafter permit any such person to inspect and make copies of said notice and statement of reasons therefor at the office of the Commission in the city of Washington. Within thirty days after the filing of an appeal, the Commission shall file with the court a copy of the order complained of, a full statement in writing of the facts and grounds relied upon by it in support of the order involved upon said appeal, and the originals or certified copies of all papers and evidence presented to and considered by it in entering said order.

Intervention

(e) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by

filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

Records and Briefs

(f) The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material and shall be prepared within such time and in such manner as the court may by rule prescribe.

Time of Hearing; Procedure

(g) At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 1009(e) of Title 5.

Remand

(h) In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

Judgment for Costs

(i) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the

Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

Finality of Decision; Review by Supreme Court

(j) The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

Title 5 U.S.C.:

§ 1009. Judicial Review of Agency Action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of Review

Any persons suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Proceedings

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Acts Reviewable

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

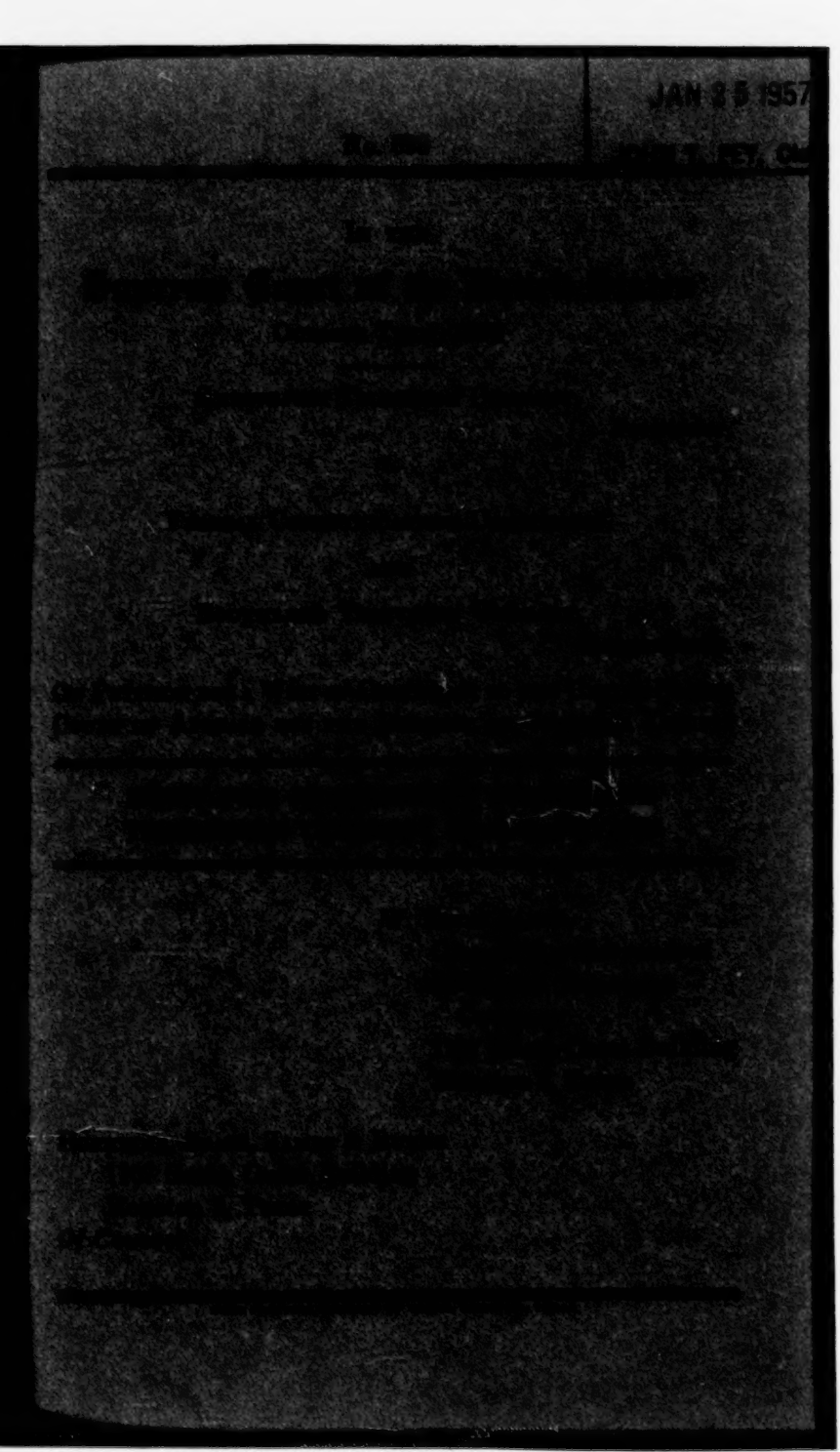
(d) Relief Pending Review

Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of Review

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold

unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (June 11, 1946 ch. 324 § 10, 60 Stat. 243.)



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 658

SHREVEPORT TELEVISION COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

AND

SOUTHLAND TELEVISION COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT SOUTHLAND TELEVISION COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is unreported and is printed in full as Appendix A to the Petition at p. 1a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Court of Appeals upon appeal from a final decision of the Federal Communications Commission pur-

suant to 47 U.S.C. Section 402(b) may vacate the decision and remand without reversal for further consideration by the Commission of an event occurring during the pendency of the appeal which destroyed the basis of the Commission's decision.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in Appendix B, pp. la-7a, of the Petition, with the exception of Section 405 of the Communications Act of 1934, as amended (48 Stat. 1095, as amended, 47 U.S.C. 405), which is set forth as Appendix A hereto, *infra*, p. A-1-2.

STATEMENT

The mutually exclusive applications of Petitioner and Respondent Southland Television Company for construction permits for television Channel 12 in Shreveport, Louisiana, were heard in a comparative proceeding before a Commission Examiner, together with that of a third applicant which has since abandoned the case.

The Examiner's Initial Decision favoring the Petitioner was issued June 7, 1954, and the Commission's final decision, released May 20, 1955, also favored Petitioner. On June 20, 1955, Respondent Southland Television Company filed a Petition for Rehearing and Reconsideration. This Petition was denied on November 17, 1955, and on December 15, 1955, Respondent appealed to the Court of Appeals pursuant to 47 U.S.C. 402(b).[1]

While the case was pending in the Court of Appeals, the principal partner and proposed full-time manager of Peti-

[1] Contrary to Petitioner's statement that "in the meantime" it had constructed and put in operation such television station, interim television service for Shreveport on Channel 12 was provided during the pendency of the proceedings before the Commission by the joint construction and operation of a station by the three competing applicants under an agreement approved by the Commission.

tioner, Don George, died on June 5, 1956. The Court was apprised of Mr. George's death by the filing of the required suggestion of death by Petitioner, and on June 11, 1956, Respondent Southland Television Company moved the Court to remand the case to the Federal Communications Commission for further consideration to determine the effect of the death of Don George. Petitioner and Respondent Commission opposed the motion upon the ground that the Court of Appeals had no authority to remand without reversal. On October 2, 1956, the Court of Appeals entered a Per Curiam Order vacating the decision and remanding the case to the Commission ". . . with directions to reconsider its decision in the light of the circumstance that, by reason of the death of Mr. Don George, *the fact to which the Commission attached greatest weight no longer exists*". (Emphasis added.)

ARGUMENT

The United States Court of Appeals for the District of Columbia Circuit is given exclusive jurisdiction under 47 U.S.C. 402(b) of appeals taken from decisions of the Federal Communications Commission denying applications for radio or television facilities. Therefore, as noted by Petitioner, no conflict could arise among the various circuits from the decision of the Court below. Nor is the decision in conflict with any prior decisions of the Court of Appeals for the District of Columbia and none of the decisions of this Court cited by Petitioner is in direct conflict with the holding below.

It is the contention of the Petitioner that the decision of the Court below conflicts with the "basic scheme" of the Communications Act, with applicable decisions of this Court, and that it violates certain specific provisions of the statute which are said to govern the jurisdiction and pro-

cedure of the Court on appeal from decisions of the Federal Communications Commission. Petitioner ascribes to the Court of Appeals a plan to enlarge the scope of its powers of review under Section 402 of Title 47 U.S.C. to include the power to alter or revise Commission decisions appealed from, a power formerly conferred upon the Court by Section 16 of the Radio Act of 1927, 44 Stat. 1169, and deleted by an amendment adopted by the Congress by Act of July 1, 1930, 46 Stat. 844, c. 788. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 60 S. Ct. 437 (1940); and *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 53 S. Ct. 627 (1933).

The effort of the Court of Appeals to enlarge its powers is said by Petitioner to have had its commencement in the case of *Albertson* v. *Federal Communications Commission*, 87 U.S. App. D.C. 39, 182 F. 2d 397 (1950), wherein the Court held that the Commission retained jurisdiction over a contested order during the period in which an appeal could be taken. Petitioner cites *W. S. Butterfield Inc.* v. *Federal Communications Commission*, ... U.S. App. D.C. ...., 237 F. 2d 552 wherein the Court refers to its holding in *Enterprise Co.* v. *Federal Communications Commission*, 97 U.S. App. D.C. 374, 231 F. 2d 708, cert. den. 351 U.S. 920, 76 S. Ct. 711 (1956), and contends that both Enterprise and Butterfield are further efforts by the Court below to stretch its powers of review.

In *Enterprise, supra*, the Court of Appeals held that an event occurring four months after the issuance of the Commission's decision, while not subject to inclusion as a ground for reconsideration by petition pursuant to Section 405 (47 U.S.C. 405), could, nevertheless, be reconsidered by the Commission, and added:

> "It is urged that the proceedings had lost a comparative character, and therefore that the Commission could

consider the agreement only under section 310(b), separate and apart from any further comparison of Beaumont's qualifications with those of Enterprise. This is another way of pressing the argument of finality. But, we repeat, the events in question, though they occurred subsequent to the August order and the petition for reconsideration, struck at the very basis which had been assigned by the Commission for its decision, and were disclosed at a time when the decision was still open for reconsideration. In these circumstances nothing in the language of sections 310(b) or 405 deprived the Commission of power to receive new evidence and to reconsider or redecide the case on a comparative basis. If this is not done the advantages of the comparative hearing are lost and its purposes frustrated. Section 310(b), important as it is in the total scheme of the Act, is no substitute for the comparative procedures available to applicants for the same permit. That section covers the situation where a transfer, assignment or other disposition of a construction permit or station license or any right thereunder, or a transfer of control of any corporation holding any such permit or license, is desired. Application must be made to the Commission, which must find that the public interest, convenience and necessity will be served thereby. Obviously these provisions do not come into play so long as a comparison between competing applicants is or should be active; and we hold that unless such comparison is kept active to take into account the new agreement here involved the rights of competing applicants are denied." 231 F. 2d 708, 712.

Petitioner neglected to point out that a writ of certiorari was sought to review the judgment of the Court of Appeals in *Enterprise, supra,* and that said petition was denied by this Court in April, 1956. See *Beaumont Broadcasting Corporation,* petitioner, v. *Enterprise Company* and *Federal Communications Commission,* No. 770, 351 U.S. 920, 76 S. Ct. 711.

In *Butterfield, supra,* WJR, the winning applicant in a three-way contest for a television station in Flint, Michigan, waited until ten days after denial by the Commission of petitions for rehearing by opposing applicants, Butterfield and Trebit, before filing an application for modification of construction permit. WJR then proposed to make changes in its programming, transmitter site, and to lease an existing one-story building for studios, thereby abandoning a proposed two-story building. The modifications proposed by WJR had been decided upon months earlier.

Butterfield and Trebit filed petitions to reopen the record because of the changed proposal of WJR, and upon denial of the petitions appeal was taken to the United States Court of Appeals for the District of Columbia.

On appeal, the Commission contended that *Enterprise, supra,* was not controlling because (1) the petitions to reopen were not filed until after denial of the petitions for rehearing, and (2) the changes were not of sufficient significance to warrant a change in the Commission's decision; that ". . . even if Enterprise requires consideration of the new events, there is no requirement of additional hearing, because the Commission has already examined the new facts and determined that they would not affect its decision." 237 F. 2d at 556.

The Court held that the changes in programming, location of transmitter site, and substantial changes in proposed studios, affected the foundation of the Commission's decision, and ordered the Commission to conduct further hearings and to reconsider its grant to WJR on the basis of the differences between WJR's original and modified proposals.[2]

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[2] See *McClatchy Broadcasting Co.* v. *Federal Communications Commission,* ..... U.S. App. D.C. ....., ... F. 2d ....., Nos. 12,470 and 12,637, decided October 18, 1956, where the Commission permitted modifications in construction permit during pendency of appeal in United States Court of Appeals for the District of Columbia.

In addition to *Albertson*, *Enterprise*, and *Butterfield*, Petitioner finds fault with the decision of the Court below in *Fleming* v. *Federal Communications Commission*, 96 U.S. App. D.C. 223, 225 F. 2d 523 (1955). In the latter case, Anthony Wayne Broadcasting, a partnership composed of James R. Fleming and Paul V. McNutt, and Radio Fort Wayne, Inc., applied to the Commission for the same television channel in Fort Wayne, Indiana. After a comparative hearing, the examiner favored a grant to Anthony Wayne. The Commission reversed the examiner and made the grant to Radio Fort Wayne, Inc., on a finding that the obvious superiority of Anthony Wayne in certain areas ". . . was outweighed by the acquiescence of the individual partners, as Journal-Gazette stockholders, 'in certain advertising practices' which were deemed 'contrary to the public interest' ". 225 F. 2d 523 at 524.

The Commission's decision was appealed by Anthony Wayne and before the appeal was argued, Mr. Paul V. McNutt died. Suggestion of death having been filed, the Court requested supplemental briefs on the question of whether the case should be remanded to the Commission and the record reopened to consider the effect of Mr. McNutt's death. While conceding that the death of Paul McNutt would be relevant to a proper consideration of the case on remand if the Court reversed, the Commission argued that the case should not be remanded without a decision upon the issues presented by the appeal upon the existing record.

The Court was of the view that, inasmuch as the decision on appeal would ". . . turn on the question whether the Commission erred in giving controlling weight to the partnership's attitude toward and acquiescence in the imposition of a joint rate on advertisers", it was entitled to the benefit of the Commission's determination as to the effect of Mr.

McNutt's death before reaching a decision on whether to reverse or affirm. 225 F. 2d at 525-526.

Petitioner states that the holdings in *Butterfield, supra, Fleming, supra,* and the instant case indicate ". . . that the Court of Appeals does not believe the comparative phase of the administrative hearing is finally concluded by the Commission's decision and expiration of the period allowed for rehearing" but that "Finality must in its view await upon decision of the appeal"; that ". . . both the Commission's discretion (to reopen the record) and the Court's power to compel its exercise extend to all events occurring while an appeal from a Commission (decision) is pending." (Petition, pp. 8, 7.)

"All events" is an encompassing term. The cases cited by Petitioner give little support to its argument that the Court below is seeking to enlarge its power of review to alter and revise Commission decisions appealed from. The changed circumstances or new events occurring in the cases referred to by Petitioner go to the very foundation of the Commission's decisions. The mere suggestion of remote possibilities does not make an important Federal question. Indeed, Judge Edgerton, concurring in *Colorado Radio Corp.* v. *Federal Communications Commission,* 73 U.S. App. D.C. 225, 229, 118 F. 2d 24, 28, pointed out that the Commission ". . . cannot be required to put aside its other duties and hold a rehearing whenever a new fact arises which might *conceivably* lead to a new conclusion." (Emphasis added.)

In the instant case, however, Mr. George's presence as the principal partner and proposed day-to-day manager of Petitioner was of paramount importance in the formulation of the Commission's decision. It was the fact to which the Commission attached "greatest weight" in making its award. The death of Don George was not a matter which

could have been raised by petition for rehearing as it occurred more than thirty days after the date of the Commission's decision. His demise, however, destroyed the foundation of the Commission's decision and the Court below was entitled to the Commission's views as to the effect of his death, in the light of the significance the Commission attached to Mr. George's participation in awarding the franchise to Petitioner.

Petitioner's argument that administrative agencies have unlimited discretion to grant or deny petitions to reopen a record is not supported by the decisions cited. This Court held in *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 64 S. Ct. 1129 (1944) that " . . . rehearings were not matters of right, but were pleas to discretion", and that " . . . the discretion to be invoked was that of the body making the order, and not that of a reviewing body". 322 U.S. at 514-515, 64 S. Ct. at 1134-1135; and that if rehearing could be demanded ". . . as a matter of law because *some* new circumstance has arisen, *some* new trend has been observed, or *some* new fact discovered, there could be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening". 322 U.S. at 514, 64 S. Ct. at 1134 (emphasis added).

Admittedly, the occurrence of some new subordinate or collateral fact, related to but not of paramount importance in the formulation of the decision, would not be sufficient to warrant the reopening of a record, but nowhere in the opinion does this Court state that an administrative agency should not reconsider a decision in the light of a new happening or the occurrence of a new event which goes to the foundation of the decision.[3]

[3] The citation given by Petitioner at p. 14 of *KFAB Broadcasting Co.* v. *Federal Communications Commission* is incorrect. The correct citation is

In *Braniff Airways, Inc.* v. *Civil Aeronautics Board*, 79 U.S. App. D.C. 341, 147 F. 2d 152, the United States Court of Appeals for the District of Columbia held that the Board had abused its discretion by its failure to reopen the record in a comparative proceeding to consider new facts as to the unavailability of a person, formerly president and principal stockholder, where the franchise had been awarded upon the qualifications and availability of such person. Don George, the principal partner and proposed day-to-day manager of Petitioner, whose ownership and participation was a factor of "greatest weight" in the Commission's decision, is no longer available to Petitioner.

It is the contention of Petitioner " . . . that the statutory scheme of judicial review contemplates solely review of the Commission's decision on the record before it and gives the Court of Appeals no authority to hold open during the pendency of an appeal the record the Commission has closed and which, under the statute governing the Commission, is no longer subject to reopening by the only method provided for that purpose — a petition to the Commission for rehearing" (Petition, p. 16). Petitioner argues that Section 405 (47 U.S.C. 405), in making the filing of a petition for rehearing a condition precedent to judicial review where the Commission has been afforded no opportunity to pass upon questions of fact or law relied upon in the appeal, shows " . . . the Act's intention that there shall not be reviewed on appeal facts other than those in the Commission record" (Petition, p. 16).

Section 405 means only that administrative remedies must first be exhausted before appeal; that where appellant

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85 U.S. App. D.C. 160, 177 F. 2d 40 (1949). The case shown under the citation inadvertently used by Petitioner is *Federal Broadcasting System, Inc.* v. *Federal Communications Commission*, 96 U.S. App. D.C. 268, 225 F. 2d 560; cert. den. 350 U.S. 923, 76 S. Ct. 212 (1955). Respondent is unable to determine which, if either, case Petitioner intended to cite.

was not a party to the proceeding below, or the Commission was given no opportunity to pass on the point relied upon, the appeal will be dismissed. See *O'Neill Broadcasting Co.* v. *Federal Communications Commission*, ... U.S. App. D.C. ...., ... F. 2d ...., (Nos. 13,113, 13,163, 13,164, decided December 13, 1956).

Respondent Southland Television Company had no opportunity to raise before the Commission the matter of Mr. George's death prior to appeal. As was stated by this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 427-428, 67 S. Ct. 1274, 1281:

> ". . . the provision of Section 10(e) that 'no objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances,' quite obviously refers to objections that might have been but were not raised in the original proceeding before the Board. In this case, however, the deputization of the guards occurred after the Board had concluded its hearing and issued its order and after the court below had refused the first time to enforce the order. It was thus a matter which could not have been raised before the Board. And the failure of respondent to raise the then non-existent issue before the Board could not deprive the court below of power to consider the issue once it did come into existence."

No provision is found in the Communications Act of 1934, as amended, or Section 10(e) of the Administrative Procedure Act expressly authorizing remand under such circumstances. However, as this Court observed in *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. at 373, 59 S. Ct. at 306-307:

> "It is familiar appellate practice to remand causes for further proceedings without deciding the merits,

> where justice demands that course in order that some defect may be supplied."

As was stated by Judge Bazelon, speaking for the Court of Appeals, in *Fleming, supra*:

> ". . . the Supreme Court's view that such procedure was proper rested not only on a statutory provision authorizing remand but also on the general equity powers which a court exercises in reviewing administrative action. Upon such a review, a court 'may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself, — to secure a just result with a minimum of technical requirements.' These principles are not limited to cases in which an agency has made inadequate findings. They extend to cases where, even without fault of the agency, the state of the record may preclude a 'just result.'" (Citing *Ford Motor Co., supra.*)

The action of the Court below was in accord with the provisions of Section 10(e) of the Administrative Procedure Act and the decisions of this Court. No important question of Communications law or of judicial review of administrative decisions is presented by the Petition.

The failure of the Solicitor General and the Commission to seek review of the order of the Court below manifests a rejection of Petitioner's contention that the ruling ". . . raises questions of central importance in the field of judicial review of administrative decisions," and "represents a bald usurpation by the Court of the Commission's discretion in respect of reopening" (Petition, pp. 4, 5). It must be presumed that if the decision below would hamstring the administrative process in the manner described by Petitioner, both the Solicitor General and the Commis-

sion would be seeking to overturn it. Parenthetically, it should be added that no petition for writ of certiorari was filed by the Solicitor General or the Commission in *Fleming, supra, Enterprise, supra,* or *Butterfield, supra.*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

W. Ervin James
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Southland Television
Company
1107 South Coast Building
Houston 2, Texas

January, 1957.

APPENDIX A

Communications Act of 1934, as amended, Section 405 (48 Stat. 1095, as amended, 47 U.S.C. 405).

Sec. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. Petitions for rehearing must be filed within thirty days from the date upon which public notice is given of any decision, order, or requirement complained of. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order, or requirement, or (2) relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which Section 402(a) applies, or within which an appeal must be taken under Section 402(b), shall be

computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed in any case, but any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

JAN 30 1957
JOHN T. FEY, Clerk

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OCTOBER TERM, 1956

No. 658

SHREVEPORT TELEVISION COMPANY, *Petitioner*

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and

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REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ERRATA

The citation appearing at p. 14 of the petition herein: *KFAB Broadcasting Company* v. *Federal Communications Commission*, 96 U.S. App. D.C. 268, 225 F.2d 560; cert. den. 350 U.S. 923, 76 S.Ct. 212 (1955) was intended to read:

> *KFAB Broadcasting Company* v. *Federal Communications Commission*, 85 U.S. App. D.C. 160, 177 F.2d 40 (1949); *Federal Broadcasting System, Inc.* v. *Federal Communications Commission*, 96 U.S. App. D.C. 260, 268, 225 F.2d 560, 568; cert. den. 350 U.S. 923, 76 S.Ct. 212 (1955).

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SOUTHLAND TELEVISION COMPANY, *Respondents*

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

The fundamental issue raised by the petition for a writ of certiorari herein is the scope of review properly open to the Court below upon appeal from a final decision in a comparative proceeding before an administrative agency. The irrelevance to this issue of the authorities upon which respondent Southland has felt constrained to rely is, perhaps, the best indication of how firm is the rule which the Court below violated.

Respondent's principal reliance on this issue seems to be on two cases arising out of petitions to enforce orders of the National Labor Relations Board.[1] Such cases present entirely different questions than do appeals from decisions of the Federal Communications Commission which have granted a Television station permit to one of competing applicants. Leaving aside the wholly unrelated duties imposed on the appellate courts by the statutes involved,[2] it is obvious that an enforcement proceeding presents problems quite unlike those involved in simple review of administrative action. When petitioned for enforcement, the appellate court is asked to apply in the present, and future, an affirmative order of the past which changed circumstances may render it wholly improper to enforce. As this Court points out in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416 (*supra*) at p. 422, "The order was a continuing command which may be effectuated in the future".

The power of a court of appeals to decline to enforce such an order in later developing circumstances which render enforcement inappropriate, however, is not a power to determine the correctness of the original administrative action on the basis of subsequent facts. As this Court said in *Jones and Laughlin* (*ibid*),

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[1] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 67 S. Ct. 1274 (1947); *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 59 S. Ct. 301 (1939).

[2] With Section 402(b) of the Communications Act are to be compared the provisions of 10(e) and 10(f) of the Labor Board statute (29 U.S.C.A. §§ 160(e), (f)). *See* discussion of the latter statute at pp. 368-370 of 305 U.S., *Ford Motor Co.* v. *National Labor Relations Board* (*supra*).

> "But unless the order was valid when issued, there is no basis whatever for it and no court can decree its enforcement in the future. Hence its validity must be judged as of the time when it was issued . . ."

So also here, the validity of the Commission's decision must be judged as of the time when it was issued; and since the Court below had no other duty or authority than to judge that validity, its consideration of subsequent events is error.

The *Ford Motor Company* case, 305 U.S. 364 (*supra*), tends even less to support the lower Court's action in this case. There, after petitioning for enforcement, the Labor Board found, in a then recent Supreme Court decision, reason to believe that it had committed an error of law in conducting the proceedings leading to its own order. It therefore asked, and received, permission to withdraw the enforcement proceedings in order to review its own action. This Court held it was properly permitted to do so. Plainly this ruling has no tendency to support a compelled reopening of a self-executing, and executed, agency ruling because of facts later arising.

Finally, respondent seeks comfort in *Braniff Airways, Inc.* v. *Civil Aeronautics Board,* 79 U.S. App. D.C. 341, 147 F. 2d 152 (1945). In that case, one competing applicant moved the Board for rehearing, alleging that an important factor upon which the Board had relied no longer existed. So far as appears, this motion was timely. The appellate court held no more than that "in denying the motion for rehearing without opinion the Board abused its discretion". (Citing only *Atchison, T. & S. F. R. Co.* v. *U. S.,* 284

U.S. 248, 52 S. Ct. 146 (1932), a case since discredited. *See* petition herein, p. 12).

Obviously, finding an abuse of discretion in the denial of a timely motion for rehearing while the Board retains jurisdiction is quite different from compelling consideration of facts arising after the time for such a petition, and the agency's jurisdiction, has terminated.

It is therefore submitted that the cases cited by respondent have no bearing on the issue here presented and, if anything, strengthen petitioner's position that in undertaking to prolong the competitive status of an applicant finally rejected by the Commission, the Court of Appeals for the District of Columbia Circuit exceeded its jurisdiction.

In closing it should be noted that both the Court below and respondent Southland Television Company have seriously misconstrued the Commission's decision in making their respective assertions (Brief in Opposition, pp. 3, 8, 10) that Don George's ownership and participation was the fact to which the Commission attached "greatest weight" in making its award to petitioner.

The quoted words are clearly taken out of context. What the Commission said was that, in arriving at the conclusion that "substantial assurance exists that Shreveport Television's program commitments will be effectuated and community needs met", "we attach greatest weight to the fact that a 43% partner with a good record of local residence and civic activity will have full charge of the day-to-day operations of the station". (Joint Appendix, p. 191).

A fair reading of the finding that there was assurance that Shreveport would carry out its program proposals shows that the Commission intended to say only that it gave this factor greatest weight among other factors also given weight in support of that rather narrow conclusion (Joint Appendix, pp. 190, 191).

In contrast, the Commission affirmatively found the two other applicants unreliable (Joint Appendix, pp. 184-189); and it is clear that Mr. Don George's death could do nothing to remedy this fatal defect. His participation was one factor, the strongest among several having the same tendency, showing that Shreveport would carry out its program proposals. It was not and could not have been the fundamental and sole basis of the Commission decision to prefer Shreveport over two competitors whose unreliability was demonstrated.

It is therefore respectfully submitted that respondent Southland has shown no ground for denial of the petition for a writ of certiorari herein. On the contrary, the irrelevance of the cases cited by it to the issue herein presented tends only to show the clarity of the rule relied on by petitioner in seeking issuance of a writ.

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